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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL., *Appellants,*

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL., *Appellees.*

Appeal From the United States District Court for the District of Maryland

MOTION OF AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, FOR LEAVE TO FILE AMICUS CURIAE BRIEF and BRIEF OF SAID FEDERATION AS AMICUS CURIAE URGING AFFIRMANCE

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MOTION OF AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The American Federation of State, County, and Municipal Employees, AFL-CIO, respectfully moves for leave to file the accompanying brief *amicus curiae* in this case. Request for the consent of the Appellants to the filing of this brief was made but was

not answered. In the District Court proceedings, the Federation by court order was allowed to file a brief as *amicus curiae.*

In support of this motion, the Federation states as follows:

1. The Federation is a labor organization representing public employees and others for collective bargaining and other mutual aid and protection. It presently has approximately 311,000 members throughout the United States. It has a total of 1,726 locals, in 44 states, the District of Columbia, Puerto Rico and the Canal Zone.

2. At the present time the Federation has approximately 37,640 members employed in schools by state and local governments and approximately 73,288 employees in hospitals, mental institutions, and nursing homes operated by state and local governments. The Federation plans and expects to admit to membership in the future substantial additional employees in these categories.

3. The Federation has chartered fifteen local unions in the State of Maryland affected by the recent amendments to the Fair Labor Standards Act and is presently organizing two more locals. It presently has approximately 1,724 members employed in schools operated by state and local governments in Maryland and approximately 1,959 members in Maryland who are employed by the state and local governments in hospitals, mental institutions, and nursing homes.

4. The employment conditions of the Federation's members employed by state and local governments and schools and hospitals are directly and materially affected by the provisions of the Fair Labor Standards

Act (29 U.S.C. § 201 et seq.; 52 *Stat.* 1060, as amended) particularly as amended by Public Law 89-601 (80 *Stat.* 830) which is the subject of this suit. The amendments extend overtime and minimum wage guarantees to these employees. The purpose and effect of these provisions is to ameliorate the working conditions of such employees, including those who are members of the Federation, and the Federation played a significant role in securing the enactment of these provisions.

5. A judgment declaring the provisions to be unconstitutional would deprive the Federation and its members of the benefits of that law.

For these various reasons, the motion for leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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IN THE

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BRIEF OF AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, AS AMICUS CURIAE URGING AFFIRMANCE

INTRODUCTION

The American Federation of State, County, and Municipal Employees is a labor organization representing public employees and others for collective bargaining and other mutual aid and protection. Over 100,000 members of the Federation are directly and materially

affected by the challenged amendments to the Fair Labor Standards Act. For these reasons, the Court below granted the Federation leave to file a brief as *amicus curiae.*

We fully subscribe to the views expressed in the opinion of Judge Winter and in the Brief of the United States to this Court. We wish to emphasize, however, that this case ultimately involves the right of some 1.4 million public employees to enjoy the modest protection that Congress has afforded them. Appellants' elaborate arguments concerning state sovereignty, cannot obscure the real effort to avoid the obligation to pay a $1.00 per hour minimum wage and time and one-half for overtime to a limited group of underpaid workers. Congress was aware, though Appellants apparently are not, that these public employees are entitled to protection similar to their counterparts in private industry and that the public employee is fully to entitled to fair treatment from his employer.

ARGUMENT

The extension of the Fair Labor Standards Act to the employees of schools and hospitals is consistent with the purposes of the Act as originally passed and, like the original Act, is clearly within the Constitutional power of Congress to regulate commerce. Appellants argue that the findings of Congress as to the need for these amendments and of the effect on commerce of the regulated activities are inadequately articulated and unsupported by evidence. Brief of Appellants, pp. 16-27. The adequacy of the evidence before Congress as to the effect of certain activities on commerce is of course not, as Appellants seem to think, reviewable by this Court in the same manner as

in a criminal case. See *United States* v. *Darby,* 312 U.S. 100, 120-121; *Wickard* v. *Filburn,* 317 U.S. 111, 129; *United States* v. *Caroline Products Co.,* 304 U.S. 144, 152-154. But, in any event, a review of the reasons stated by Congress demonstrates conclusively that it was relying upon considerations identical to those underlying the passage of the original act.

This Court has stated that the primary purpose of the Act was to eliminate substandard labor conditions throughout the nation as rapidly as practicable. *Powell* v. *U.S. Cartridge Co.,* 339 U.S. 497, 509-510. And that Congressional aim, among others, was expressly asserted in the Committee reports respecting the amendments now challenged. Congress, with restrained eloquence, set forth the need for these amendments in terms totally consistent with the aims this Court has previously declared appropriate to Congressional exercise of the power to regulate commerce:

> "... These enterprises which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.' Since Federal Government hospitals have wages at levels which are at or above the present minimum wage level, and the committee can be assured that such wage levels will not fall below the statutory minimum, the extension of coverage provided by this bill does not include the employees of such hospitals (except as provided in section 306 of the bill). Even outweighing the consideration of unfair competition between covered and noncovered enterprises were the needs of the employees of these enterprises.

> A custodial worker in an educational institution is as much in need of a minimum standard of living as a custodial worker in an aircraft plant. A transit worker has the same basic financial needs regardless of whether he works for a taxicab company or a local bus system. A food service employee faces the same cost-of-living problems whether employed by a hospital or a food service contractor. Neither employee should be compelled to subsidize the costs of these services to the consumer. Such institutions are compelled to purchase goods and contract services from employers who must pay the minimum wage. They cannot, in good conscience, deny their own employees this bare minimum. They continue to expand and construct new facilities at the prevailing market costs. They can pay their own employees wages necessary for the maintenance of the minimum standard of living." H.Rep. No. 1366, 89th Cong., 2d Sess.[1]

In attempting to buttress their claim that Congress did not adequately consider this legislation, Appellants incorrectly state that there was no debate in the House regarding the removal of the exemption for public schools. Brief of Appellants, p. 16. Judge Winter, for the Court below, set out in his opinion the extended discussion on this very question. *Maryland* v. *Wirtz,* 269 F. Supp. 826, 830, n. 10. Congressman Collier, the sponsor of the amendment, gave one particularly compelling example in support of the desirability of his amendment:

> "In a suburban area of one of our southern States, school officials were recently notified that

[1] As pointed out below, see p. 9, *infra,* the Committee recommended coverage of hospitals and institutions of higher learning but did not recommend coverage for elementary and secondary schools.

poverty funds were available to hire students who qualified under the poverty family income level at $1.25 per hour. What happened was this: The same school had working in the cafeteria women who had been employed for years—in fact, one was a widow—drawing 85 cents an hour for working in the school cafeteria. Yet, children were hand-picked and given $1.25 an hour to wash the blackboards in the same school.

"I do not believe there is anyone sitting in this House today who can justify this type of situation realizing, as we all must, that there will be under the poverty program a $1.25 hourly wage level. If not, then I would have grave reservation as to the depth of the sincerity such a Member would have in the principle of minimum wage." 112 Congressional Record (May 25, 1966), pp. 10820-10821.

Mr. Collier's amendment passed the House. In conference, the more comprehensive House bill was adopted. Conference Report No. 2004, September 6, 1966, 2 U.S.C. Congressional and Administrative News (89th Cong., Second Sess.) p. 3047. The notion that a bill that has gone to conference has in some way escaped Congressional scrutiny because one house acceded to the bill passed by the other is, of course, based on a total misconception of the legislative process.

Underlying the Fair Labor Standards Act is the Congressional finding that substandard working conditions lead to labor disputes burdening and obstructing commerce and the free flow of goods in commerce and interfere with the orderly and fair marketing of goods in commerce. 29 U.S.C.A. § 202. In extending the Act to the employees here involved, Congress was undoubtedly aware of the recent labor relations turmoil

among public employees. The past few years have seen a sharp and dramatic increase in the number of labor disputes involving public employees.[2] Many of the strikes that have resulted involved the very groups of employees covered by the amendments now under challenge.[3] There have been public employee strikes in which the question of premium pay for overtime work constituted a critical issue.[4] We are aware of at least two strikes involving members of our union during the very period Congress had this bill under active consideration.[5] Labor disputes disrupt commerce whether the striking workers are public employees or private employees. Congress could rightly conclude, as it did, that the flow of drugs and other interstate commodities used by a hospital or books used by a school is impeded by a labor dispute without regard to the governmental or non-governmental status of the employer.

Appellants concede that an extended teacher strike would lead to a situation in which interstate commerce would "feel the pinch". Brief of Appellants, p. 22. We cannot conceive that Congress is precluded from deciding that work stoppages by school custodial em-

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[2] *Work stoppages involving government employees*, 1966. Summary Release, United States Department of Labor, Bureau of Labor Statistics, July 1967. *Time Magazine*, March 1, 1968, p. 34, 35.

[3] *New York Times*, October 6, 1967; *Columbus Dispatch*, November 27, 1967; *Dayton Journal Herald*, November 9, 1967; *Milwaukee Sentinel*, December 21, 1967; *Milwaukee Journal*, June 16, 1966; *Pontiac Press*, December 6, 1967.

[4] *New Haven Register*, December 1, 1967.

[5] *Palo Alto Times*, September 12, 1966 (Richmond, California School District); *Kenosha News*, September 23, 1966 (Milwaukee County Hospital).

ployees are, in the same manner as teacher strikes, potentially disruptive of interstate commerce.

Appellants' attempts to distinguish the clear line of decisions by this Court supporting the constitutionality of the amendments are equally unpersuasive. Their arguments necessarily rest on the proposition that activities otherwise regulable by the Congress under the Commerce Clause are beyond Congressional power where undertaken by a state. It could not, of course, be seriously contended that the operations of private hospitals or private schools involving, as they do, significant quantities of interstate commodities are beyond the reach of Congressional authority under the Commerce Clause. The decisions of this Court make clear that the extension of coverage under the Fair Labor Standards Act to these private institutions is well within the ambit of Congressional power. See *Wickard* v. *Filburn, supra; Labor Board* v. *Reliance Fuel,* 371 U.S. 224; *Katzenbach* v. *McClung,* 379 U.S. 294. *Cf. N.L.R.B.* v. *Central Dispensary & Emergency Hospital,* 145 F. 2d 852 (C.A. D.C. 1945), cert. denied, 324 U.S. 847.

As Judge Winter correctly held, however, the argument that activities otherwise regulable under the Commerce Clause are immunized when performed by governmental bodies has been explicitly rejected by this Court on a number of occasions. As long ago as 1943, the point was so well established that this Court summarily rejected such a contention, holding that: "Finally, it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether

they be the activities of private persons or public agencies." *California* v. *United States*, 320 U.S. 577, 586. Where the state engages in activities which, if private, are subject to regulation under the Commerce Clause, it is clearly subject to Congressional authority. *United States* v. *California*, 297 U.S. 175; *Parden* v. *Terminal Railroad Co.*, 377 U.S. 184; *City of Takoma* v. *Taxpayers*, 357 U.S. 320; *Board of Trustees* v. *United States*, 289 U.S. 48; *Case* v. *Bowles*, 327 U.S. 92.

Appellants attempt to escape the force of those precedents by arguing that the operations of public schools and hospitals are, in some unexplicated way, "especially unique" and for that reason, unlike the activities involved in the earlier cases, "do not constitute or engage in commerce. (sic)" Brief of Appellants, p. 8. But public bodies have no present or historical monopoly in the operations of schools and hospitals. At the present time, private institutions account for over 65 percent of the gross expenditures by nonfederal hospitals [6] and 21 percent of the gross expenditures by schools in the United States.[7]

The stipulated facts describing the relative proportion of public and non-public hospitals in Maryland are revealing. Of 74 nonfederal hospitals in Maryland, only 19 are operated by state or local governments.[8] Of a total of 44 institutions of higher learning, only 20 are publicly owned.[9] Of a total of 1655 schools, 508

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[6] Appellants' Appendix, p. 122a.

[7] Stipulation, Schools—United States. (The Appellants did not reproduce in their entirety the Stipulations below which are, however, a part of the record.)

[8] Appellants' Appendix, p. 116a.

[9] *Ibid.*, p. 113a; Stipulation, Maryland Schools.

are privately operated.[10] Nationally, less than half of all nonfederal hospitals are publicly operated and they account for some 22% of the total admissions.[11] Only 800 out of 2184 institutions of higher learning are public and close to 20% of all elementary and secondary schools are nonpublic.[12]

Appellants themselves refute the argument that these activities whose regulation they challenge are "unique." They contend that 84.3% of all children attending elementary and secondary schools in Maryland are in the public school system. Brief of Appellants, p. 19. Necessarily, therefore, they concede that 15.7% of the children attend non-public schools. Similarly, Appellants' contention that 91.6% of all mental patients in Maryland are confined in state hospitals concedes that the remainder are in non-public hospitals.[13] And, as we have previously shown, when all types of hospitals in Maryland are considered, only 15% of all admissions are by public hospitals. See p. 12, *supra*.

Historically, private operation of schools antedated public operation. Public education was essentially confined to New England until about 1850. History of Education, 7 Encyclopedia Britannica p. 980 (1955 ed.) ("In 1825, always excepting certain portions of New England, where the free school system had become thoroughly established, such schools were only the distant hope of statesmen and reformers . . . .") We would be the last to maintain that education is not an

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[10] *Ibid.*, p. 112a; Stipulation, Maryland Schools.

[11] Stipulation, Hospitals—United States, Attachment B.

[12] Stipulation, Schools—United States, Attachment B.

[13] Appellants argue that all tubercular patients in Maryland hospitals are in state hospitals. They do not and could not seriously argue that there are no private hospitals treating tubercular patients.

appropriate function for government but it is well to remember that a little more than a century ago the right of the state to tax for education was a fighting issue. Ibid. p. 981. Only four years ago, the Supreme Court of one of the appellant states held that each county in that state had "an option to operate or not operate public schools," and this Court accepted that decision as a definitive and authoritative holding of state law. *Griffin* v. *School Board,* 377 U.S. 218, 229-230,[14] citing *County Board* v. *Griffin,* 204 Va. 650, 113 S.E. 2d 565.[15] As regards hospitals and institutions of higher learning, the statistics cited above show that the majority remain private institutions.

In sum, state-owned hospitals and schools are no more "especially unique" than state-operated railroads, timber camps or farms, all of which this Court has held subject to regulation under the Commerce Clause, see p. 12, *supra.* Indeed, state operation of a penal farm, which this Court held subject to the Agricultural Adjustment Act, *United States* v. *Ohio,* 385 U.S. 9, is far more unique than the state operations involved in the instant case. The contention that the earlier precedents of this Court are inapplicable because the activities involved here are unique simply does not withstand analysis.

In apparent recognition of the fact that their supposed distinctions of the earlier decisions of this Court

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[14] In *Griffin,* this Court made clear that the closing of the schools in Prince Edward County was impermissible only since intended to discriminate on the basis of race. This Court's opinion clearly implied that cessation of state-operated schools for nondiscriminatory reasons would raise no constitutional difficulty.

[15] We find that "definitive and authoritative" holding somewhat inconsistent with Appellants' assertion that in Virginia the provision of a free school system is required by constitutional mandate. Brief of Appellants, p. 23, n. 3.

are analytically untenable, Appellants reiterate on numerous occasions that Congress has here impermissibly trenched upon the rights of state legislatures to make fiscal judgments. Congress, of course, did no such thing. It simply declared that henceforth a carefully delimited group of public employees should, like their private counterparts, receive a very modest minimum wage and, under certain circumstances, premium pay for overtime work. Depending upon whether the states chose to continue these activities at their present level, to reduce them, or to alter them in some other way, this might mean that a given state could find it necessary to appropriate more funds for these purposes. But the decisions as to whether taxes will be raised or whether these increased labor costs will be met in another fashion remains the prerogative of the states. As Judge Winter noted, similar arguments concerning the fiscal independence of the states were rejected by this Court in *Oklahoma* v. *Atkinson,* 313 U.S. 508, 534 and, indeed, in each of the many cases in which this Court upheld the applicability of Congressional regulations to the states there was the possibility of increased costs for the states involved. *Maryland* v. *Wirtz,* 269 F. Supp. 826, 846.

And so, stripped of their considerable rhetoric, Appellants' arguments rest on the proposition that they should not be required to eliminate what Congress has determined to be substandard working conditions. Federalism is a two way street. This legislation might never have been necessary had the vigorous exponents of states' rights in this litigation expounded as vigorously the correlative requirement of states' responsibilities. The grocer charges the attendant at a public hospital the same amount that he charges the attendant at a private hospital. The shoes that the janitor at a

public school buys for his children cost the same as the shoes purchased by his counterpart at a private school. Unhappily, the wages Congress has declared to be a minimum standard in these areas remain insufficient to raise a worker's family above the poverty level. But these employers oppose even that.

Congressman Collier relied, in sponsoring the coverage of school employees, on the fact that regular cafeteria employees were in some instances earning only 85 cents an hour. See p. 9, *supra*. Such facts speak far more eloquently than lengthy legal rhetoric about states rights. No amount of inapplicable, esoteric abstractions regarding state sovereignty can convert this case from anything but the familiar attempt of employers to resist the obligation to raise the wages of their employees to those modest minimums Congress has established. Congress had before it facts that cried out for relief and, fortunately, it has the constitutional authority to grant that relief.

CONCLUSION

For the reasons stated herein, the decision of the Court below should be affirmed.

Respectfully submitted,

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